

SEP 04 2003

Before the  
Federal Communications Commission  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In the Matter of	)	EB Docket No. 02-21
	)	
<b>PENINSULA COMMUNICATIONS, INC.</b>	)	
	)	File No. EB 01-IH-0609
Licensee of stations	)	FRN 0001-5712-15
KGTL, Homer, Alaska,	)	Facility ID Nos. 52152
KXBA(FM), Nikiski, Alaska;	)	86717
KWVV-FM, Homer, Alaska, and	)	52145
KPEN-FM, Soldotna, Alaska	)	52149
	)	
Licensee of FM translator stations	)	
K292ED, Kachemak City, Alaska,	)	52150
K285DU, Homer, Alaska,	)	52157
K285EG and K272DG, Seward, Alaska	)	52158 and 52160
	)	
Former licensee of FM translator stations	)	
K285EF, Kenai, Alaska,	)	
K283AB, Kenai/Soldotna, Alaska,	)	
K257DB, Anchor Point, Alaska,	)	
K265CK, Kachemak City, Alaska;	)	
K272CN, Homer, Alaska, and	)	
K274AB and K285AA, Kodiak, Alaska	)	

To The Commission

**ENFORCEMENT BUREAU'S  
REPLY BRIEF TO EXCEPTIONS**

Respectfully submitted,  
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September 4, 2003

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## Summary

This case involves egregious misconduct going to the heart of what the Commission requires of its licensees – licensees must follow Commission rules. For 15 months, *Peninsula Communications, Inc.* (“PCI”) refused to follow a direct order of the Commission to stop its illegal operation of seven FM translators. It continued to ignore the Commission’s order even when subsequent Commission and court orders made it abundantly clear that its continued operation was without legal justification. The evidence adduced in this proceeding made plain that PCI’s principal reason for defying the Commission was to further its own economic interests. PCI only stopped operating the translators when ordered by a court to do so. Even then, it made clear that if the injunction were lifted it would ignore the Commission’s order and intentionally begin again to operate illegally.

The *Initial Decision* (“*ID*”) revoked the two PCI licenses for the full-service stations whose signals PCI transmitted to the seven translators in order to illegally extend the reach of the primary stations. The record could have justified revocation of all of PCI’s licenses. The *ID*’s decision to revoke only those two full-service licenses most related to PCI’s misconduct is eminently reasonable and fully supported by the record. To do anything less, such as revocation of PCI’s remaining translator station licenses, as now suggested by PCI, would simply reward PCI for its intentional flouting of the Commission’s authority by allowing it largely to get off the hook. Affirmance of the *ID* is necessary to make clear to PCI and other potential miscreants that this kind of intentional lawlessness will simply not be tolerated.

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To The Commission

**ENFORCEMENT BUREAU'S  
REPLY BRIEF TO EXCEPTIONS**

1 On August 21, 2003, Peninsula Communications, Inc ("PCI") filed its Exceptions and Brief ("Exceptions") to the *Initial Decision of Chief Administrative Law Judge Richard L Sippel*, FCC 03D-1, released June 19, 2003 ("*ID*"). Pursuant to section 1.277(c) of the Commission's rules,<sup>1</sup> the Enforcement Bureau ("Bureau") hereby submits its Reply to PCI's

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<sup>1</sup> 47 C.F.R. § 1.277(c). See also 47 C.F.R. § 1.4(h).

Exceptions The Bureau emphasizes that its failure herein to comment on any particular exception or argument should not be construed as a concession to the correctness or accuracy of the exception or argument

## **I. Counterstatement of the Case**

### **A. Overview**

2 On May 18, 2001, more than five years after questions were initially raised about PCI's operations, the Commission ordered PCI to stop operating seven of its FM translators.<sup>2</sup> PCI did not comply with that directive.<sup>3</sup> Consequently, on August 29, 2001, the Commission warned PCI that its continued illegal operation of the translators raised the prospect of a revocation hearing that could lead to the loss of one or more of PCI's licenses.<sup>4</sup> Nevertheless, PCI continued illegally to operate the translators.

3 In February 2002, the Commission commenced this proceeding to determine the facts and circumstances surrounding PCI's continued operation of the seven FM translators<sup>5</sup> and to

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<sup>2</sup> *Peninsula Communications, Inc.*, 16 F.C.C.R. 11,364 (2001) ("*Termination Order*").

<sup>3</sup> PCI filed an appeal of the *Termination Order* with the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), but never received a stay of the *Termination Order*, and did not even seek one until July 2002. See "Enforcement Bureau's Proposed Findings of Fact and Conclusions of Law" ("Bureau PFCs"), pp. 35-6, 39. Ultimately, the court affirmed the Commission. *Peninsula Communications, Inc. v. FCC*, 55 Fed. Appx. 1, 2003 WL 242,660 (D.C. Cir. 2003).

<sup>4</sup> *Peninsula Communications, Inc.*, 16 F.C.C.R. 16,124 (2001) ("*NAL & Order*").

<sup>5</sup> The Commission separately imposed a forfeiture of \$140,000 for PCI's willful and repeated violations of 47 U.S.C. § 301. See *Peninsula Communications, Inc.*, 17 F.C.C.R. 2,832 (2002).

determine whether PCI possessed the requisite character to retain its licenses.<sup>6</sup> The evidence established that PCI had knowingly violated direct and unambiguous Commission orders directing that it cease operations of the translators. Although PCI raised various arguments to justify its misconduct, all of which were rejected or deemed moot by the rulings of two different United States courts of appeals,<sup>7</sup> the evidence showed that PCI's defiance of the Commission resulted from a desire to maximize its profits regardless of whether it did so in an unlawful manner. Simply put, PCI's principals feared that loss of the translators would cripple the company's finances, so they decided to ignore the *Termination Order*.<sup>8</sup> Also, they were angry at the Commission for not approving a proposed sale of the translators under terms and conditions which would have allowed the translators to operate as they had previously.<sup>9</sup> The evidence also established that, but for a federal injunction, which ultimately became effective in July 2002, PCI would have continued to operate the translators in defiance of the *Termination Order*.<sup>10</sup>

4. Consequently, the *ID* correctly concluded that PCI had violated a direct and unambiguous Commission order<sup>11</sup> for 15 months, with knowledge of the potential consequences

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<sup>6</sup> *Peninsula Communications, Inc. (Order to Show Cause)*, 17 F.C.C.R. 2,838, 2,842 (2002) ("OSC").

<sup>7</sup> See *Peninsula Communications, Inc. v FCC*, *supra*, 55 Fed. Appx. 1; *United States of America v Peninsula Communications, Inc.*, 287 F.3d 832 (9<sup>th</sup> Cir. 2002).

<sup>8</sup> Bureau PFCs, pp. 38-9.

<sup>9</sup> *Id.*, pp. 29-31.

<sup>10</sup> *Id.*, p. 39. The *ID*, p. 27, ¶ 77, thus gives PCI far too much credit when it finds that PCI and its principals had begun to rehabilitate in August 2002.

<sup>11</sup> *ID*, p. 24, ¶ 67.



to it for doing so. Further, PCI acted as it did in order to delay the adverse financial effects of the Commission's order for as long as possible.<sup>12</sup> The *ID* therefore correctly concluded that this misconduct called into question PCI's reliability in obeying any future Commission order with which it disagreed.<sup>13</sup> However, because PCI's defiance was unaccompanied by deception, the *ID* found that it did not reach the level of "most egregious."<sup>14</sup> Accordingly, the *ID* revoked only the licenses of the two primary stations deemed an integral part of PCI's "network,"<sup>15</sup> KWVV-FM, Homer, and KPEN-FM, Soldotna, and did not revoke PCI's other licenses. The *ID* concluded that revocation of the two full-power broadcast licenses, along with various other losses and costs to PCI, constituted sufficient penalties to ensure PCI's reliability in its future dealings with the Commission.

5 The *ID*'s ultimate conclusions are not only most generous to PCI, but also fully supported by substantial record evidence. PCI's Exceptions should be denied.

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<sup>12</sup> *Id.*, ¶ 68.

<sup>13</sup> *Id.*, ¶ 70.

<sup>14</sup> *Id.*, p. 26, ¶ 74.

<sup>15</sup> The *ID* described PCI's "network" as including the two primary stations as well as the seven translators whose licenses had already been terminated by the *Termination Order*. *Id.*, p. 5, ¶ 15.

## **B. Background**<sup>16</sup>

6 PCI commenced broadcasting in Alaska's Kenai Peninsula in 1979.<sup>17</sup> Over the next 13 years, it developed a network of stations, which consisted of two full-power FM broadcast stations and nine FM translators.<sup>18</sup> The translators allowed PCI's two full-power stations, KWVV-FM, Homer, and KPEN-FM, Soldotna, to be received in various Alaskan communities and markets that would not otherwise have received their service.<sup>19</sup> Expanding the reach of its full-power stations through these translators allowed PCI to compete for advertising dollars with a distinct advantage over full-power stations that were local to those markets. Specifically, the cost of building and operating the translators was significantly less expensive than building and operating full-power stations. Moreover, PCI had no public interest responsibilities to the markets the translators reached, while competing full-power broadcasters in those markets faced the panoply of responsibilities imposed upon them by the Commission's rules. Finally, PCI could claim to national advertisers that its stations could reach the entire Kenai Peninsula and Kodiak Island with one buy. On the other hand, if those same advertisers chose to use PCI's competitors, they would have to make multiple buys in order to reach the residents and businesses of Kodiak Island, as well as the Kenai Peninsula communities of Seward, Kenai and

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<sup>16</sup> The background of this proceeding is set forth in greater detail in the *I D.*, pp. 3-4.

<sup>17</sup> *Id.*, p. 5

<sup>18</sup> *Id.*, Bureau PFCs, pp. 6-9, 12-15

<sup>19</sup> *I D.*, pp. 4-5

Soldotna, and Homer<sup>20</sup>

<sup>7</sup> In 1990, the Commission adopted new translator rules<sup>21</sup> The *Translator R&O* restructured the rules so that translators would fulfill their intended purpose as a secondary service, that is, to provide supplementary service to areas in which direct reception of radio broadcast stations was unsatisfactory.<sup>22</sup> In addition, the *Translator R&O* amended the rules to ensure that FM radio broadcast stations were not adversely affected by translator operations.<sup>23</sup> Consequently, the new rules proscribed ownership of “other area” translators by primary station licensees.<sup>24</sup> The *Translator R&O* imposed a very strict waiver standard, noting that the Commission would be “favorably disposed” to requests for waiver of the ownership rule only in “white area”<sup>25</sup> situations in which service “is indeed unavailable.”<sup>26</sup> Likewise, the new rules prohibited primary station licensees from providing any financial support, either directly or indirectly, to the licensee of an “other area” translator, either before or after commencement of

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<sup>20</sup> *Id.*, p. 6; Bureau PFCs, pp. 15-18

<sup>21</sup> *In the Matter of Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, 5 F.C.C.R. 7,212 (1990) (“*Translator R&O*”) See also 55 Fed. Reg. 50,690 (Dec. 10, 1990)

<sup>22</sup> *Translator R&O*, 5 F.C.C.R. at 7,212

<sup>23</sup> *Id.*, 5 F.C.C.R. at 7,213

<sup>24</sup> See 47 C.F.R. § 74.1201(d), (h) and (i) for definitions of primary station, fill in and other area translators, respectively

<sup>25</sup> For purposes of the proceeding, the *Translator R&O* defined “white area” as any area outside the coverage contour of any full-time aural service. *Translator R&O*, 5 F.C.C.R. at 7,216, ¶ 23

<sup>26</sup> *Id.*

operations<sup>27</sup> The Commission designed the new restrictions on ownership and financial support both to protect existing full-power stations from competition from translators and to maximize service by full-power stations The *Translator R&O* explained. “While the establishment of independent party translators in these other locations [*i.e.*, other area translators] indicates a public desire for the programming, translators owned by FM radio broadcast stations would more likely indicate a station’s interest in reaching audiences in areas that lie outside its service area. More generally, we believe that to relax restrictions on FM radio broadcast ownership of translators would conflict with our belief that the public interest is best served by maximizing service through the use of FM radio broadcast stations”<sup>28</sup>

8 With respect to the delivery of the primary station’s signal to a translator, the *Translator R&O* allowed commercial translators providing fill-in service to use only terrestrial transmission facilities in order to obtain the primary station’s signal Even in “white area” situations, the *Translator R&O* provided that commercial translators, no matter whether owned independently or by the primary station licensee, would receive the primary station’s signal only by terrestrial means. The *Translator R&O* retained the old signal delivery rule permitting satellite delivery only for non-commercial educational translators operating on a reserved channel, and owned and operated by the licensee of the primary station.<sup>29</sup> In discussing the signal delivery rule, the *Translator R&O* expressed the Commission’s intention to continue to accord “special treatment”

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<sup>27</sup> *Id.*, 5 F.C.C.R. at 7,217

<sup>28</sup> *Id.*, 5 F.C.C.R. at 7,215, ¶ 22

<sup>29</sup> *Id.*, 5 F.C.C.R. at 7,220-21

to Alaska broadcasters. Specifically, the *Translator R&O* stated: “We intend that our decisions herein not alter in any fashion the special treatment we accord Alaska *Wrangell Radio Group*, 75 FCC 2d 404 (1980). Upon appropriate showing the Commission has accommodated Alaska’s unique lack of adequate communications services by granting waivers allowing program origination, alternative signal delivery, and cross-service translating.”<sup>30</sup> So as not to unduly disrupt service provided by FM translators already in operation, the *Translator R&O* allowed licensees a lengthy grace period of three years from the requirements of the new ownership and signal delivery rules, rather than a permanent exemption.<sup>31</sup> PCI never submitted a request to waive the ownership restrictions now appearing in revised section 74.1232(d) of the Commission’s rules for any of its other area translators that were in operation before June 1, 1991.<sup>32</sup>

9 Beginning in March 1996, the Commission’s staff and the Commission itself repeatedly advised PCI that its operation of “other area” translators was contrary to section 74.1232(d) of the Commission’s rules.<sup>33</sup> Initially, PCI attempted compliance through a sale of

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<sup>30</sup> *Id.*, 5 F.C.C.R. at 7,245, n. 59. As discussed, *infra*, this is the footnote in the *Translator R&O* upon which PCI relies to justify its defiance of the *Termination Order*.

<sup>31</sup> *Id.*, 5 F.C.C.R. at 7,232. By *Memorandum Opinion and Order*, the Commission denied petitions for reconsideration of the *R&O* *In the Matter of Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, 8 F.C.C.R. 5,093 (1993) (Off. Not. Ex. 6). See also 58 Fed. Reg. 42,020 (Aug. 6, 1993). Ultimately, for existing translators, the new rules became effective on June 1, 1994. See *Order*, 6 F.C.C.R. 2,334 (1991).

<sup>32</sup> Bureau PFCs, p. 12.

<sup>33</sup> *ID*, pp. 8-11.

its translators.<sup>34</sup> However, when it became clear to PCI as a result of Commission orders<sup>35</sup> that the transaction could not be completed as PCI had envisioned, it refused to modify its deal with the prospective buyer of the translators or cease operating the translators after being ordered to stop by the Commission. Rather, PCI continued to operate the translators as if their licenses had been granted in perpetuity and stopped operating them only when its principals faced the possibility of being held in contempt for violating a federal court injunction.<sup>36</sup> All the while, neither the Commission nor any court has upheld PCI's interpretation of what the *Translator R&O* required.

## **II. Arguments Addressed to PCI's Exceptions**

### **A. Revocation of Licenses for KWVV-FM and KPEN-FM Is Legally Permissible and Fully Supported**

10 PCI initially contends that issue (b) of the *OSC* requires an “all or nothing” approach. PCI claims that the *OSC* did not give it notice that a possible outcome of this proceeding was revocation of less than all of its licenses and that such an outcome was outside the scope of the presiding Administrative Law Judge's (“ALJ”) authority. PCI thus contends that, because the *ID* concluded that its behavior did not warrant revocation of all of its licenses, none should be revoked.

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<sup>34</sup> *Id.*, pp. 9-10

<sup>35</sup> See *Peninsula Communications, Inc.*, 13 F.C.C.R. 23,992 (1998), *recon. dismissed in pertinent part*, 15 F.C.C.R. 3,293 (2000), *appeal dismissed without prejudice sub nom. Peninsula Communications, Inc. v. FCC*, No. 00-1079 (D.C. Cir. July 11, 2000).

<sup>36</sup> *ID.*, pp. 11-16

11 The OSC' instructed the ALJ to determine whether "its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked." While, unlike some other cases, this did not put PCI on explicit notice that it faced the possible loss of only some of its licenses, we believe such a possibility is clearly implicit in the OSC' The Commission has often chosen to revoke fewer than all of the designated licenses, as the *ID* noted.<sup>37</sup> and we believe that PCI, through its experienced communications counsel, was well aware of this fact

12 PCI has not argued, nor can it reasonably suggest, that it would have presented additional or different evidence had issue (b)'s wording made explicit that loss of less than all of its licenses was possible. To the extent that they are even remotely related to this proceeding, the cases cited by PCI in support of its contentions merely stand for the proposition that an administrative agency cannot act in a manner that will adversely affect an entity unless and until the entity has adequate notice of the steps it must take to defend its interests.<sup>38</sup> Here, PCI had such notice and presented its defense. The fact that PCI's defense fell short does not mean that

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<sup>37</sup> *ID.* pp 26-28

<sup>38</sup> See *North Alabama Express, Inc v US*, 585 F.2d 783, 784 (5<sup>th</sup> Cir. 1978), *Hess & Clark, Division of Rhodia, Inc v FDA*, 495 F.2d 975, 983 (D.C. Cir. 1974), *Robertson v FTC*, 415 F.2d 49, 51-52 (4<sup>th</sup> Cir. 1969). In *Pfizer v Richardson*, 434 F.2d 536 (2d Cir. 1970), the court held that Pfizer's right to a trial-type hearing relative to the withdrawal of authorization from the Food and Drug Administration for the distribution of various drugs was not absolute. Rather, to justify the need for a trial, Pfizer had to show that a substantial factual dispute existed. *Id.*, 434 F.2d at 543

PCI lacked sufficient notice<sup>39</sup>

## **B. The I.D. Appropriately Revoked PCI's Licenses for KWVV-FM and KPEN-FM**

13 PCI argues that the I.D. incorrectly tagged KWVV-FM and KPEN-FM as being involved in the misconduct and improperly revoked these licenses despite the exemplary record of those stations. We disagree. KWVV-FM and KPEN-FM played a key role in PCI's illegal operation of the translators as they were the stations whose programming PCI illegally broadcast over the translators. Thus, the licenses selected for revocation were integrally connected to PCI's wrongdoing. In any event, the Commission has broad discretion in fashioning an appropriate sanction that will deter future misconduct. Revoking the licenses for full-service broadcast stations KWVV-FM and KPEN-FM is a reasonable and appropriate approach.<sup>40</sup>

14. We also disagree with PCI's suggestion that any revocation should be limited to its additional FM translator station licenses. Such a limited sanction simply would not hit PCI where it hurts. It would not give the Commission sufficient reason to believe that PCI has

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<sup>39</sup> To the extent the Commission concludes that the OSC permitted only an "all or nothing" approach, for the reasons set forth in the Bureau's PFCs, we recommend the Commission revoke all of PCI's licenses.

<sup>40</sup> Indeed, the Commission has made clear that revocation can be appropriate even if none of the stations were directly involved in the misconduct. See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1206-07 (1986) (subsequent history omitted) ("Character Policy Statement"); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. 3252 (1990) (subsequent history omitted) ("1990 Character Policy Statement"). See also *Contemporary Media, Inc.*, 13 F.C.C.R. 14437, 14444 (1998) (conviction of licensee principal for repeated sexual abuse of children is an independent basis for license revocation), *recon. denied*, 14 F.C.C.R. 8790 (1999), *aff'd* 214 F.2d 187, 194-96 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001).



learned its lesson and will comply with Commission orders in the future. And, it would send a message to others that intentional disregard of Commission orders in pursuit of profits is not something to worry about too much. Rather, the I D reasonably and appropriately concluded that, in addition to the seven FM translator stations that PCI had already lost before it decided to ignore the Termination Order, it was necessary to revoke the two primary stations that had served these translators and thus constituted the heart of PCI's lucrative but illegal network.

### **C. The I.D. Did Not Err in Finding that PCI Did Not Have Waivers to Operate Translators**

15 PCI also makes the meritless argument that the *I D*. erred when it observed that PCI's authority to operate the translators had expired in 1994.<sup>41</sup> As noted above, beginning in March 1996, the Commission's staff and the Commission itself repeatedly held that PCI's operation of the seven translator licenses canceled by the *Termination Order* was contrary to the revised translator rules.<sup>42</sup> Those rulings make plain the *Commission's* view that, whatever authority PCI had relative to the translators expired on June 1, 1994, when the revised translator rules became effective as to grandfathered stations. The *I D* did nothing more than recite this indisputable fact. Similarly, PCI continues to argue that the *Translator R&O* allowed PCI to operate the seven translators post June 1, 1994. Long ago, the Commission explicitly found

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<sup>41</sup> *I D*., p. 4, ¶ 11 and p. 18, ¶ 53.

<sup>42</sup> Official Notice Ex. 7; Official Notice Ex. 8; Official Notice Ex. 10; Official Notice Ex. 11; Official Notice Ex. 12; Official Notice Ex. 13; Official Notice Ex. 14

otherwise.<sup>43</sup> That matter is *res judicata*.<sup>44</sup>

16 In any event, even assuming *arguendo* that PCI did, contrary to decisions of the Commission and the courts, have authority to operate prior to the *Termination Order* that would still be irrelevant to the question presented here. The bottom line is that PCI intentionally chose to defy a direct Commission order. Even if PCI believed, and indeed may still believe, that it had the authority to do so does not make its behavior any less heinous. Indeed, even if the *Termination Order* had been overturned rather than affirmed by the United States Court of Appeals for the District of Columbia Circuit, revocation of the two licenses chosen by the *I.D.* would still be fully justified.<sup>45</sup>

#### **D. The I.D. Applied the Appropriate Standard of Proof**

17 Citing *Sea Island Broadcasting Corp. v. FCC*,<sup>46</sup> PCI claims that the *I.D.* applied the

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<sup>43</sup> *Peninsula Communications, Inc.*, *supra* note 35, 13 F.C.C.R. at 23,998 n.12

<sup>44</sup> Also settled, contrary to PCI's suggestion, is whether sections 1.62 and 73.3523 of the Commission's rules (47 C.F.R. §§ 1.62, 73.3523) provide any justification for PCI's operation of the translators subsequent to the *Termination Order*. Again, both the Commission and a court have spoken and held that the rules gave PCI no right to operate the translators. *E.g.*, *United States of America v. Peninsula Communications, Inc.*, *supra* note 7, 287 F.3d at 839-40. Finally, PCI insists that sections 307, 402 and 405 of the Communications Act (the "Act") (47 U.S.C. §§ 307, 402, 405) gave it the right to operate. To the contrary, the *I.D.* correctly held that those provisions gave PCI no authority whatsoever, since the fate of PCI's translator applications and licenses had been decided by the Commission as of the release of the *Termination Order*.

<sup>45</sup> The Bureau assumes that PCI's continued focus on its belief that it had reasons to defy the *Termination Order* is presented as part of its litigation strategy and does not suggest that, notwithstanding the *I.D.*'s conclusion that PCI had learned its lesson, PCI continues to believe that it is permissible to violate a Commission order if PCI thinks that the order is wrong.

<sup>46</sup> 627 F.2d 240 (D.C. Cir. 1980).

wrong standard of proof. PCI argues that the *ID*. should have used the “clear and convincing” standard instead of a “preponderance of the evidence ”

18. Again, PCI is wrong. In *Steadman v SEC*, 450 U.S. 91, 102 (1981), the Supreme Court held that by the Administrative Procedure Act, Congress intended to establish the preponderance of the evidence standard for application in administrative adjudicative proceedings. Thus, *Sea Island* has not been good law for more than two decades, and Commission cases subsequent to *Steadman* have accordingly applied the preponderance of the evidence standard in adjudicative proceedings.<sup>47</sup> The *ID* was correct in doing so in the instant proceeding.

### **III. Conclusion**

19. In the instant case, the Commission terminated PCI’s operating authority for seven translators in May 2001 because it found them to be operating inconsistently with the translator rules. Notwithstanding PCI’s full awareness of the order so terminating its authority, PCI continued to operate. Moreover, after being explicitly warned in August 2001 by the Commission that its actions violated section 301 of the Act, and that it risked loss of all its licenses by continuing to operate, PCI continued to do so for nearly a year before terminating operations on its unlicensed translators. As the *ID* correctly concluded,<sup>48</sup> PCI willfully and repeatedly violated section 301 of the Act by knowingly operating seven unlicensed translators

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<sup>47</sup> See, e.g., *Silver Star Communications-Albany, Inc.*, 6 F.C.C.R. 6905, 6907 n.3 (1991).

<sup>48</sup> *ID.*, p. 20, ¶ 57.

for more than a year after the *Termination Order* and for nearly a year after the *NAL and Order* PCI also willfully and repeatedly violated section 416(c) of the Act<sup>49</sup> by knowingly failing to observe and comply with a Commission order. which remained in effect since May 19, 2001.

20 In determining the weight to be accorded acts of misconduct, the Commission considers the willfulness of the misconduct, its frequency and its currency. The Commission also takes note of the seriousness of the misconduct, the nature of the participation of the licensee's managers and owners, and the efforts made to remedy the wrongs. Ordinarily, the Commission also takes into account the entity's record of compliance with FCC rules and policies<sup>50</sup> As the *I D.* makes clear, PCI's misconduct was intentional, extended for a substantial period of time, and did not end until the eve of the hearing in this proceeding, and then only because a preliminary injunction that had been issued by a federal district court judge had become effective PCI's misconduct was serious, going to the very heart of the Commission's regulatory authority and the Commission's ability to rely on its licensees, and resulted from decisions made and actions voluntarily taken by PCI's sole owners, the Beckers In addition, PCI's current compliance with the *Termination Order* is tied to the preliminary injunction; should it end, PCI's Mr. Becker has so much as promised to resume operations on the seven translators.

21 PCI's knowing defiance of the *Termination Order* involved seven translators, which it used to illegally extend the reach of two of its full-power stations, KPEN-FM and KWVV-FM.

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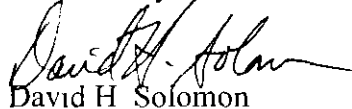
<sup>49</sup> 47 U.S.C. § 416(c)

<sup>50</sup> *Character Policy Statement*, *supra*, 102 F.C.C.2d at 1227-28.

By doing so, PCI enjoyed revenues that would otherwise have been available to full-service licensees in Kodiak and Kenai/Soldotna, which, unlike PCI, were operating legally. PCI did not stop its misconduct because to do so would have injured its own economic interest.

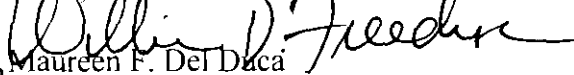
22. PCI's intentional and extended defiance of a direct Commission order made clear that a significant sanction is necessary to ensure its future compliance. The *ID* correctly concluded that PCI clearly deserved to lose the licenses of the stations used in its network operations, including the licenses of the two full-power broadcast stations which were integrally involved in PCI's wrongdoing. Any less sanction would not give the Commission sufficient confidence that PCI finally understands that compliance with a direct Commission order is not optional; it is mandatory.

Respectfully submitted,



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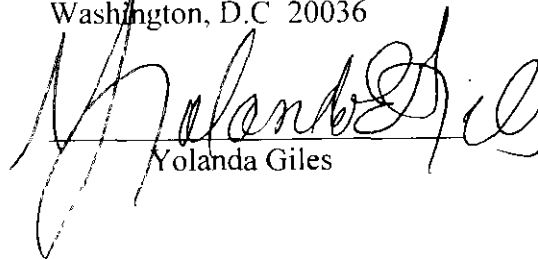
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September 4, 2003

**Certificate of Service**

Yolanda Giles, a staff assistant in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 4th day of September, 2003, sent by first class United States mail one copy of the foregoing "Enforcement Bureau's Reply Brief to Exceptions" to

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